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No. 93-488

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

MARGARET L. ROULETTE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Authorities ii

I. THE ISSUE PRESENT HEREIN HAS BEEN PRESENTED TO AND RULED UPON BY ALL COURTS BELOW 1

II. THIS COURT DOES NOT LACK JURISDICTION BASED UPON THE INDEPENDENT AND ADEQUATE STATE GROUNDS TEST ... 4

III. RESPONDENTS HAVE BY THEIR OWN ARGUMENT SHOWN THE INAPPLICABILITY OF THE PRESUMPTIONS TO THIS CASE 6

IV. SECTION 66424 OF THE SUBDIVISION MAP ACT IS THE LAW; THE LOWER COURT'S REFUSAL TO FOLLOW THE CLEAR AND UNAMBIGUOUS LANGUAGE IS A VIOLATION OF DUE PROCESS 7

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

Banks v. Ogden, 69 U.S. 57 (1864) 5

Hormel v. Helvering, 312 U.S. 552 (1941) 2

Iran v. Immigration and Naturalization Service, 656 F.2d 469 (1981) 3

Martinez v. Mathews, 544 F.2d 1233 (1976) 4

Morrow v. Greyhound Lines, Inc., 541 F.2d 713 (1976) 2

Shelley v. Kraemer, 334 U.S. 1 (1947) 5

Singleton v. Wulff, 428 U.S. 106 (1975) 2

Webb v. Webb, 451 U.S. 493 (1981) 3

UNITED STATES CONSTITUTION:

Fourteenth Amendment, § 1 ..... 4, 5

STATUTES:

California Civil Code

§ 831 ..... *passim*

§ 1112 ..... *passim*

California Code of Civil Procedures § 2077(6) 7

Calif. Government Code:

Subdivision Map Act §§ 66410 et seq. ..... *passim*

§ 66424 ..... 6, 7, 8, 9

§ 66499.32 9

§ 66499.52(a) 3, 6

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REPLY TO BRIEF IN OPPOSITION

I

THE ISSUE PRESENT HEREIN HAS BEEN PRESENTED TO AND RULED UPON BY ALL COURTS BELOW

From its beginning this case has involved the primary legal question regarding the proper application of the principle recognized almost everywhere, either as a general rule of construction or as a rebuttable presumption, that if land abutting on a highway is conveyed by a description or designation apt or effective to cover it, and the grantor owns the fee to the center of the highway, the grantee takes title to the center line of the highway as part and parcel of the grant *unless an intention to the*

contrary sufficiently appears. This principle is codified in California as rebuttable presumptions at California Civil Code §§ 831 and 1112.

From the earliest motions, through summary judgment, the appellate court as well as the Petition for Review to the California Supreme Court, the objection to the manner of the application of §§ 831 and 1112 has been steadfastly maintained and pursued by Petitioner. The purpose for pleading the issues below is stated as follows:

> "The purpose of the rule is to inform promptly the trial judge of possible errors so that he may have an opportunity to reconsider his ruling and make any changes deemed desirable . . . The rule is adhered to save in exceptional cases where the obvious result would be a plain miscarriage of justice, [citations] or inconsistent with substantial justice." [citations]. *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (1976).
>
> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Singleton v. Wulff*, 428 U.S. 106 at 120 (1975).

The claims and issues presented in the instant Writ are precisely the same claims and issues which were

presented to the courts below. The record as a whole both expressly and by clear implication shows that Petitioner was denied due process of the law when the lower courts ruled that: (1) the presumptions of section 831 and 1112 could only be rebutted by a showing of a contrary intent on the part of the original subdivider of the property; and (2) that the "lot" described in the California Subdivision Map Act at § 66499.52(a) was not the "lot" to be referred to when deciding the illegality of divisions of property as proscribed by the Act.

That the foregoing points and issues were argued and briefed extensively in the lower courts is beyond dispute. That the issues presented herein involve a federal claim is similarly beyond legal dispute. See *Iran v. Immigration and Naturalization Service*, 656 F.2d 469 at 471 (1981) wherein application of a presumption to the wrong factual setting is a due process violation. For a final judgment of a state court to be reviewable by this Court "the record as a whole [must] show either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493 at 496-497 (1981). The issues presented herein were presented squarely to the state courts.

But, even stronger support for this Court to consider the issues presented here is the fact that these issues are purely questions of law.

> "It is frequently said that appellate courts should not consider issues raised for the first time on appeal. [citations]. But, even if this rule is pertinent here, *it can give way when a pure question of law is involved* and a refusal to consider it would result in a miscarriage of justice."

[citations] *Martinez v. Mathews*, 544 F.2d 1233 at 1237 (1976). Italics supplied.

Even if the issues herein were presented for the first time in this Court, the fact that they involve purely questions of law should serve as sufficient reason for review. But as noted, this is not the first time Respondents have seen and opposed these issues thereby precluding, or at the very least severely vitiating, any claim that this is the first time these issues have been raised.

The issues are properly before this Court.

II

THIS COURT DOES NOT LACK JURISDICTION BASED UPON THE INDEPENDENT AND ADEQUATE STATE GROUNDS TEST

Respondents' argument misconceives the issue. Petitioner has from the beginning, the same as now, maintained that it is the judiciary's conduct in misapplying the presumptions of §§ 831 and 1112 which has resulted in the due process violations. In fact, Respondents acknowledge that it is the application by the lower courts "which is consistent with a long line of authority applying those sections to determine the boundaries of lots bordered by roadways, particularly in plotted subdivisions." (See Respondents' Brief in Opposition at p. 6).

The issue giving rise to the federal due process claim under the Fourteenth Amendment, § '1' is not, as Respondents suggest, the application of §§ 831 and 1112 in a determination of ownership rights in the adjacent roadway. Rather, the due process violation results from the

application of those sections to a factual situation completely lacking the necessary elements required for their application.

Only in a factual situation involving a dispute over ownership of the adjacent roadway can the principle embodied within §§ 831 and 1112 be applied once the *grant* has been examined for a *contrary intent*. This is precisely what the U.S. Supreme Court case of *Banks v. Ogden*, 69 U.S. 57 at 68 (1864) held, as has numerous other federal and state cases nationally.

The welter of theories proffered by Respondents in their arguments with the ensuing obfuscation can be visioned away by the application of a relatively simple legal proposition. Given that the presumptions of §§ 831 and 1112 are merely aids in the construction of grants, if the grant(s) is clear about what land is being conveyed, then what need is there for application of the presumptions? There is none.

> "That the action of state courts and of judicial officers in their official capacities is to be regarded as actions of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1 at 14 (1947).

III

RESPONDENTS HAVE BY THEIR OWN ARGUMENT SHOWN THE INAPPLICABILITY OF THE PRESUMPTIONS TO THIS CASE

Respondents point out that Petitioner's due process rights were not violated by application of the state statutory presumptions regarding ownership of roadways. (See Resp. Opp. Br. p. 10.). As pointed out, the presumptions of §§ 831 and 1112 go only to the issue of *ownership of the roadways.*

Ownership has never been in dispute in this case. Therefore, application of the presumption and the resultant court ruling requiring rebuttal to come from evidence of the original subdivider's intent is total misapplication of §§ 831 and 1112 and it is unconstitutional.

Furthermore, application of the presumptions to a California Subdivision Map Act case is in addition to being logically untenable, legally improper.

The Subdivision Map Act provides the definition of a "lot" at § 66499.52(a). Respondents and the lower courts have attempted to utilize the definition of a "technical" lot found in the §§ 831 and 1112 cases to supplant the one provided for in the Act; and then by way of genie like incantations declare that it is that "technical" lot, rather than the Map Act lot, which shall be used to determine whether or not there has been an illegal subdivision of a "lot" as proscribed by the Map Act at § 66424.

There is no *"rational connection"* between Civil Code §§ 831 and 1112, and the Subdivision Map Act with regards to the issue of illegal subdivisions of land.

Respondents further attempt to bolster an unbolsterable argument by suggesting that the presumptions can be applied to the Map Act because they have been applied to "various types of cases involving boundary issues." (See Resp. Opp. Br. p. 12).

The cases cited by Respondents involve a dispute over ownership of the adjacent roadway. This is precisely the same dispute the presumptions serve to resolve as pointed out by Respondents at page 10 of their brief. That dispute is lacking here.

Respondents, however, once again misconceive the issue by suggesting that the cases involve boundary issues. Nothing could be further from the legal point. Boundary issues are resolved in California by resort to Code of Civil Procedure § 2077 (6) wherein is stated that one refers to the final subdivision map to determine the boundaries of the described lot(s). When ownership of adjacent roadways is questioned Civil Code §§ 831 and 1112 controls. If there is no question of ownership then there is no occasion to apply the presumptions, it is that simple.

Applying the presumptions to a fact situation such as the one at hand, which does not involve a dispute as to *ownership* of the adjacent roadway, violates Petitioner's due process rights.

IV

SECTION 66424 OF THE SUBDIVISION MAP ACT IS THE LAW; THE LOWER COURT'S REFUSAL TO FOLLOW THE CLEAR AND UNAMBIGUOUS LANGUAGE IS A VIOLATION OF DUE PROCESS.

The case at hand resulted in a determination by the courts below that Petitioner's "contrary intent" as

expressed in the deeds to Respondents, constituted an "illegal subdivision" of property. It seems axiomatic that in order to find that there has been an illegal subdivision the court below had to find that there was first a "subdivision."

Section 66424 of the Map Act mandates, when determining if a subdivision has occurred, that the "latest county assessment roll" be utilized to identify the particular property which is alleged to have been illegally subdivided. Petitioner has simply asked the lower courts to follow that statutory language.

Respondents contend without authority that a state court can refuse for reasonable reasons to rely on legislative authority as codified in the statutory law. Apparently the lower courts believed this also because they did not follow the mandate of § 66424.

The attorney general opinions relied upon by both Respondents and the lower courts to support their refusal to follow § 66424 have nothing to do with the issue of whether or not there was an "illegal subdivision."

As this Court and all legal experts are aware, Attorney General Opinions are very specialized and are addressed exclusively to the particular issue presented for the opinion.

As stated, Petitioner merely argued, and correctly so, that before he could be adjudged in violation of the Map Act for an "illegal subdivision," he must first have been deemed to have effectuated a "subdivision." This determination must begin with § 66424 and its language. The courts below chose arbitrarily to ignore the language of

that section and in so doing egregiously violated Petitioner's Due Process rights.

Similarly, § 66499.32, next to the last paragraph, exempts a seller from the harsh remedy of rescission when the property sold is referenced in a final map. Respondents acknowledge, as did the lower courts, that Petitioner refererced the final map. However, the inclusion in the deeds of a "contrary intent," as provided for at Civil Code §§ 831 and 1112, is treated by the courts below as language which changes the import of § 66499.32, next to the last paragraph. That holding has never been made in California and cannot be made without offending due process. The application of the statute by the courts below has rendered Map Act § 66424 and § 66499.32, next to the last paragraph, not only vague but also meaningless.

CONCLUSION

This case is illustrative of countless others in this state and perhaps across the country wherein a litigant, particularly one in pro per, is afforded less than his "day in court." The issues involved in this case involve purely questions of law and are easily decided without need for further briefing. The statutes and case law, which are nationwide from both state and federal courts, are abundantly clear.

Failure of the courts below to follow and apply that law to the facts of this case has resulted in a callous and

blatant violation of Petitioner's due process rights. Rights to which thus far the courts below have been purblind.

Respectfully submitted,

Dated: October 29, 1993

/s/ James E. Smith
Propria Persona